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No.

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72-315

In the

Supreme Court of the United States

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

JO ANN RAINES, as special administrator of the estate of Thomas Raines,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

JO ANN RAINES, as special administrator of the estate of Thomas Raines,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, New York Central Railroad Company, a corporation, prays that a Writ of Certiorari issue to review the judgment and opinion of the Illinois Supreme Court entered in an F.E.L.A. case on March 30, 1972.

OPINION BELOW

The opinion of the Illinois Supreme Court appears at ..... Ill. 2d ....., 283 N.E. 2d 230 and is printed in the Appendix hereto. The opinion of the Illinois Appellate Court, 1st District, is reported at 129 Ill. App. 2d 294, 263 N.E. 2d 895, and is also printed in the Appendix hereto.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on March 30, 1972, and a Petition for Rehearing was denied on May 25, 1972, and this Petition for Certiorari was filed within 90 days of that date.

QUESTIONS PRESENTED

1. May the Illinois Supreme Court apply rules of evidence contrary to the precedents established by this Court in Federal Employers Liability Act cases?

2. May the Illinois Supreme Court disregard a prior decision of this Court and other federal courts and allow evidence of Railroad Retirement benefits in an F.E.L.A. case?

3. Should conflicts be permitted to exist in F.E.L.A. cases between the various state courts and between the various circuits of the Federal courts with respect to whether income tax and future inflation should be taken into account in computing damages, where these areas of evidence have a substantial effect on the amount of damages awarded in F.E.L.A. cases?

STATEMENT OF THE CASE

On May 18, 1967, the plaintiff, Thomas Raines, age 28, was injured and suffered the loss of both legs when caught between two railroad cars while working as a switchman for the New York Central Railroad in the Englewood Yards in Chicago, Illinois. Suit was brought against the railroad under the Federal Employers Liability Act. The railroad admitted liability and the case was submitted to the jury solely on damages.

The jury assessed plaintiff's damages in the amount of $750,000. The railroad appealed because improper evidence of future loss of Railroad Retirement benefits and

plaintiff's counsel's employment of trial tactics designed to arouse the passions and prejudices of the jury resulted in an excessive verdict. Evidence was also permitted to be adduced from a contact representative of the Railroad Retirement Board that if the plaintiff, a 28-year-old railroad employee of but three weeks, remained for the rest of his work life (30 years) he would receive, based upon present mathematical projections, in excess of $500 per month.

During trial the plaintiff's attorney undertook a repeated and persistent examination of economic experts for the purpose of advising the jury as to the probable devaluation of the dollar through never ending inflation (see Appendix, Exhibit C, showing this testimony).

The trial court permitted the evidence of inflation and then refused to give a cautionary instruction advising the jury that its award would not be subject to Federal income tax. The trial court's refusal of the income tax instruction was based upon prior decisions of the Illinois Supreme Court in F.E.L.A. cases in which it refused this instruction because income tax "introduces an extraneous subject giving rise to conjecture and speculation".

Thus, on the one hand, the jury was permitted to take into consideration the probability of future inflation and future Railroad Retirement benefits in determining the amount of damages to be awarded, while on the other hand, it was not permitted to take into consideration the fact that its award would not be subject to Federal income tax.

On appeal the Illinois Appellate Court followed the unanimous decisions of all previous cases, including a

case before this Court, that Railroad Retirement benefits are not admissible into evidence, pointing out that evidence of such benefits would constitute double recovery. It also held that it was error to permit "expert" testimony of future inflation since such evidence, like income tax, was also speculative and conjectural. As a result, the Illinois Appellate Court reversed and remanded for a new trial.

The plaintiff's petition for leave to appeal to the Illinois Supreme Court was allowed and that court reversed and reinstated the judgment of the trial court. The Illinois Supreme Court ignored the holding of this Court and found that the evidence of alleged lost future Railroad Retirement benefits was proper. It also reaffirmed its prior holdings that the jury should not be instructed that its award would not be subject to income tax and then held that evidence of never ending inflation was harmless, although the verdict of $750,000 for the injuries sustained was "high" (citing four property damage cases to support its holding). The Illinois Supreme Court ignored the rule set forth by this Court that F.E.L.A. verdicts "found to be in any degree the result of appeals to passion and prejudice", should not be permitted to stand.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS AND CONFLICTS AS TO WHAT CONSTITUTES PROPER EVIDENCE IN ACTIONS ARISING UNDER THE FEDERAL EMPLOYERS LIABILITY ACT.

It is well established that the provisions of the F.E.L.A. apply to determine the measure of plaintiff's damages and that damages under the F.E.L.A. are governed by Federal law. *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U.S. 485, 491 (1916); *Sleeman* v. *Chesapeake & Ohio Ry.*, 414 F. 2d 305, 307 (CA6, 1969); *Hall* v. *Minn. Transfer Ry.*, 322 F. Supp. 92, 95 (D.Minn. 1971).

It is also well established that only if Federal law controls can the F.E.L.A. be given uniform application throughout the country to effectuate its purposes. *Dice* v. *Akron C & Y R. Co.*, 342 U.S. 359 (1952).

This case involves three areas of evidence, Railroad Retirement benefits, income tax, and future inflation, rulings upon which substantially affect the amount of damages awarded in F.E.L.A. cases. The ruling of the Illinois Supreme Court permitting Railroad Retirement testimony is unique. Other decisions, both Federal and state with respect to income tax and inflation, conflict, resulting in a lack of uniformity in applying the F.E.L.A.

There is no reason for the damages to be awarded for the same injury under the same federal statute to be affected by different evidence rules because of where the law suit is filed. If this Court continues to permit different rules of evidence to apply to F.E.L.A. cases, it will encourage forum shopping by plaintiff's attorneys in order

to obtain trials in the jurisdictions with the most liberal evidentiary rules in order to obtain the maximum bodily injury award. Such a result has never been encouraged by this court. *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965).

II.

CONTRARY TO DECISIONS BY THE SUPREME COURT OF THE UNITED STATES AND OTHER FEDERAL COURTS, THE ILLINOIS SUPREME COURT HAS HELD THAT RAILROAD RETIREMENT BENEFITS ARE ADMISSIBLE INTO EVIDENCE IN AN F.E.L.A. CASE.

Except for the Illinois Supreme Court ruling in the instant case, every other case in the United States in which the issue has been raised, holds that Railroad Retirement benefits are not admissible into evidence. This Court enunciated this principle in *Eichel* v. *New York Central R.R. Co.*, 375 U.S. 253 (1963), and it is the law of the land. Both before and after *Eichel* it has been uniformly held that Railroad Retirement benefits are not admissible into evidence whether the attempt at introduction was by plaintiff or defendant. *Sinovich* v. *Erie R.R. Co.*, 230 F. 2d 658 (CA3, 1956); *Hetrick* v. *Reading Co.*, 39 F. Supp. 22 (D.N.J. 1941); *Riley* v. *West Virginia Northern R. Co.*, 51 S.E. 2d 119 (W.Va. 1948), cert. den. 336 U.S. 961; *Missouri-Pacific R.R. Co.* v. *Willingham*, 348 S.W. 2d 764 (Tex.Ct.Civ.App. 1961); *Gilroy* v. *Erie-Lackawanna R.R. Co.*, 279 F. Supp. 139 (S.D.N.Y. 1969); *Fuhrman* v. *Reading Co.*, 439 F. 2d 10 (CA3, 1971).

Under the Railroad Retirement Act, which was created for railroad employees before the establishment of Social Security, a beneficiary must be employed by a railroad for seven months in order to qualify for unemployment com-

pensation and disability benefits. He must be employed for ten years in order to qualify for retirement benefits (.147, 148, 150). If he finds himself in a position to make a claim and lacks the requisite time requirements, all contributions made to his Railroad Retirement account are transferred to his Social Security account and his claims are then handled under the provisions of the Social Security Act (A.149) which also provides like benefits for unemployment, disability and retirement.

At the time of his injury, the plaintiff was 28 years old. He had started work for the railroad 19 days before he was injured. His prior work record indicated that he had never worked more than two years for any of his five or more previous employers. In order to establish some foundation, plaintiff speculated during trial that he intended to work for the railroad for the balance of his life.

Over objection, the plaintiff produced a "contact representative" of the Railroad Retirement Board who testified, in part, that plaintiff's Railroad Retirement benefits mathematically computed 37 years in the future would be over $500 per month without the current experimental supplement ($70 per month) (A.146-148).

In *Eichel* v. *New York Central R. Co.*, 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963), this Court refused to permit testimony of Railroad Retirement Act benefits which the defendant railroad sought to introduce to show the extent and duration of the alleged disability claimed by the plaintiff. This Court, recognizing the spirit of the Federal Statute, held that the evidence of such benefits should have been excluded.

To avoid these holdings the Illinois Supreme Court changed Railroad Retirement Act benefits into a "pen-

sion" and then cited cases involving pension rights to support its position. Nevertheless, even with this change in terminology, that court was unable to cite a single F.E.L.A. case to support the admission of such evidence because none exists. Railroad Retirement benefits are not "pension" benefits, they are part of the system of social legislation on a complete parallel with Social Security benefits. In fact, Social Security applies for retirement until a person is employed with the railroad for at least 10 years.

> "The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. The retirement fund is supported by tax collections from the employer and employee, 26 U.S.C. §§1500, 1520, and to a limited extent by the general public, 45 U.S.C.A. §§228c, 228o, and 228p." *New York, N.H. and H.R. Co.* v. *Leary*, 204 F. 2d 461, 468 (CA1, 1953), cert. den., 346 U.S. 856.

In the instant case the plaintiff was claiming additional damages for benefits he actually did not lose because of the accident. He was eligible for a Social Security disability pension and established future wage loss based on gross annual earnings and his life expectancy. At the time of the accident he had only been employed by the railroad for approximately three weeks. The only purpose of this evidence was to artificially increase the elements of damage and thereby increase the award. The evidence did not represent any monetary loss.

Furthermore, as pointed out by the Illinois Appellate Court, this evidence was a duplication of future lost wages. As stated by that court:

> "[T]his evidence was duplicative of other testimony which sought to compensate the plaintiff for lost wages over his life expectancy of 42.8 years, which

would encompass his projected years of retirement. Plaintiff could not be entitled to both the compensation for lost earnings and possible retirement benefits by virtue of the pension." 129 Ill. App. 2d at 305, 263 N.E. 2d at 900-901.

The cases relied upon by the Illinois Supreme Court are not to the contrary. In *Boston and Maine Ry. Co.* v. *Talbert,* 360 F. 2d 286 (CA1, 1966), Railroad Retirement benefits were admitted into evidence, but no one objected to their admissibility. *Cunningham* v. *Rederiet Vindeggen, A/S,* 333 F. 2d 308 (CA2, 1964), did not involve Railroad Retirement benefits.

This Court should not permit the Supreme Court of Illinois to avoid the law of the land on this subject by labeling Railroad Retirement benefits as "pension" benefits where the fact is that they are Social Security benefits.

If the decision of the United States Supreme Court in *Eichel* is to stand and this case is not reversed, then the posture of the law in F.E.L.A. cases will be that evidence of Railroad Retirement benefits is not admissible when offered by a defendant, but notwithstanding this principle, the same evidence is admissible when offered by the plaintiff when he so chooses so that he can inflate his damage potential. If this present state of the law is condoned and not corrected, it is axiomatic that a railroad defendant cannot obtain a fair trial.

III.

THE STATE AND CIRCUIT COURTS OF APPEAL ARE IN CONFLICT AS TO WHETHER FEDERAL INCOME TAX SHOULD BE CONSIDERED IN AWARDING DAMAGES.

The question of whether a fact finder in awarding damages should take into account the effect of income tax, has

been a major source of disagreement throughout the country.

The Illinois Supreme Court has again held that a jury should not be instructed that, under the law, its award is not subject to income tax. The basis of this decision is set forth in the F.E.L.A. case of *Hall* v. *C & N.W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (1965), where the Illinois Supreme Court held that it was improper to permit argument or instruct a jury that personal injury awards are free from income tax, because

> "It introduces an extraneous subject, giving rise to conjecture and speculation." 5 Ill. 2d at 152, 125 N.E. 2d at 86.

The Third Circuit has recently held that a jury should be given a cautionary instruction that any award will not be subject to Federal income tax and the jury, therefore, should not add or subtract any amount for taxes in fixing the amount of any award, *Domeracki* v. *Humble Oil and Refining Co.*, 443 F. 2d 1245, 1251 (CA3, 1971), cert. den. 404 U.S. 883. In *Cox* v. *Northwest Airlines, Inc.*, 379 F. 2d 893 (CA7, 1967), cert. den. 389 U.S. 1044; and *O'Connor* v. *United States*, 269 F. 2d 578, 584 (CA2, 1959), it was held that income tax is a factor which should be taken into account in making an award for bodily injury or death.

Other Circuits hold that income tax should not be taken into account. *McWeeney* v. *New York, N.H. & H. R.R.*, 282 F. 2d 34 (CA2, 1960) (a 3 to 2 decision); *Cunningham* v. *Bay Drilling Co.*, 421 F. 2d 1398, 1399 (CA5, 1970); *Prudential Insurance Co.* v. *Wilkerson*, 327 F. 2d 997, 998 (CA5, 1964); and *New York Central R.R.* v. *Delich*, 252 F. 2d 522, 527 (CA6, 1958).

In the instant case the trial court refused to give a cautionary instruction advising the jury that its award was

not subject to federal income tax, a procedure specifically approved by the Third Circuit Court of Appeals in *Domeracki*. The rule as to whether juries should be advised of the law applicable to income taxes on their awards should be uniform among the Circuits in all cases and especially in F.E.L.A. cases. This issue alone requires a decision by this Court.

IV.

THE COURTS ARE DIVIDED AS TO WHETHER THE POSSIBILITY OF NEVER ENDING INFLATION SHOULD BE AN ELEMENT OF DAMAGES IN DECIDING THE AMOUNT TO BE AWARDED IN F.E.L.A. CASES.

The income tax question is interwoven with another issue which has also caused major disagreement throughout the country, especially in F.E.L.A. cases. The question is: Should a damage award be directly affected by speculation on future inflation?

Obviously, if income tax is not to be considered because it is too "speculative and conjectural" (*Hall* v. *C & N.W.* Ry., 5 Ill. 2d at 152, 125 N.E. 2d at 86), the same logic dictates that "inflation forever" is even more "speculative and conjectural". Inflation is a vague term which easily arouses fear of disaster in the listener without any guidelines.

In the instant case, the Illinois Appellate Court held that the trial court erred in permitting testimony from experts that inflation might continue forever because this testimony was, like the subject of "income tax", speculative and conjectural (129 Ill. App. 2d at 304, 263 N.E. 2d at 900). The Illinois Supreme Court reversed because in their opinion, although "the award was high", the error was harmless.

This "harmless error" finding is directly contrary to this Court's decision in *Minneapolis, St. P. & S.S.M. Ry. Co.* v. *Moquin,* 283 U.S. 520 (1931), where it is stated at pages 521-522:

> "In actions under the Federal Statute, no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of wrong inflicted upon his opponent." (Emphasis added)

With admitted liability and severe injuries plaintiff's counsel added the fear of future inflation to further influence the jury's emotions. Each of plaintiff's economic witnesses were interrogated about the problems of inflation and depreciation of the dollar (A. 124-128, 129-131, 141, 144-145, 152, 156, 159, 180, 183, 191, 193, 214, See Appendix C). Plaintiff's witnesses not only testified as to past inflation (A. 124-128, 152), but also speculated about future inflation (A. 130-131, 141, 144-145, 155, 159, 217).

Typical of this approach, the plaintiff's economist, John P. Henderson, told the jury, "If I were a betting man, I would bet that there will be a formal devaluation of the dollar after the 1968 election" (A. 144).

The Federal courts have been split on the question of whether finders of fact should be allowed to consider future trends in the purchasing power of money. The Circuit Courts of Appeal in the First and Sixth Circuits and a District Court have rejected the use of inflation as a consideration in determining damages. *Petition of United States Steel Corp.,* 436 F. 2d 1256, 1279-1280 (CA6, 1970), cert. den. 402 U.S. 987, rehg. den. 403 U.S. 940; *Murphy*

v. *Eaton, Yale & Towne, Inc.*, 444 F. 2d 317, 328 (CA6, 1971); *Williams* v. *United States*, 435 F. 2d 804, 807 (CA1, 1970); *Sleeman* v. *Chesapeake & Ohio Ry.*, 414 F. 2d 305, 308 (CA6, 1969); *Armentrout* v. *Virginian Ry.*, 72 F. Supp. 997 (S.D.W.Va. 1947), rev'd on other grounds, 166 F. 2d 400 (CA4, 1948).

In *Sleeman* v. *Chesapeake & Ohio Ry.*, 414 F. 2d 305, 308, the Sixth Circuit stated:

> "Nor do we encourage the trial courts of our circuit to explore such speculative influences on future damages as inflation and deflation."

Other Federal courts such as the Fifth and Ninth Circuits and some District Courts have taken the opposite view. These courts have pointed out that some inflation over a period of years seems to be a fact of life and should be considered. *Hord* v. *National Homeopathic Hospital*, 102 F. Supp. 792, 796 (D.D.C. 1952), aff'd per curiam, 204 F. 2d 397 (D.C. Cir. 1953); *Cunningham* v. *Bay Drilling Co.*, 421 F. 2d 1398, 1399 (CA5, 1970); *Scruggs* v. *Chesapeake & Ohio Ry. Co.*, 320 F. Supp. 1248 (W.D.Va. 1970); *Thomas* v. *Conemaugh Black Lick R.R.*, 133 F. Supp. 533 (W.D.Pa. 1955), aff'd, 234 F. 2d 429 (CA3, 1956); *Southern Pacific Co.* v. *Zehnle*, 163 F. 2d 453 (CA9, 1947); *Vaughan* v. *Southern Bakeries Co.*, 247 F. Supp. 782, 789 (D.S.C. 1965); *Magill* v. *Westinghouse Electric Corp.*, 327 F. Supp. 1097, 1104-1105 (E.D.Pa. 1971); *Brooks* v. *United States*, 273 F. Supp. 619, 627-628 (D.S.C. 1967).

This Court should resolve this disagreement and provide guidelines to all courts hearing F.E.L.A. cases as to whether future inflation should be an element in awarding damages. Such evidence necessarily influences the amount of jury awards in a very substantial degree. If income tax is not to be taken into account because it is too

speculative, then inflation must be subject to the same standard. On the other hand, if it is appropriate to prognosticate the future of the economy for indefinite periods of time, then at a very minimum it must also be proper to consider the effect of taxes on any award.

CONCLUSION

The plaintiff is, of course, entitled to damages for his injury under the F.E.L.A. However, the railroad should be entitled to a fair trial by a jury uninfluenced by improper evidence. Obviously, inflation "forever" and Railroad Retirement benefits substantially affected the minds and emotions of the jury.

This Court should require the Illinois Supreme Court to follow the law of the land and mandate the exclusion of Railroad Retirement benefits. Furthermore, this Court should avail itself of the opportunity to resolve the conflicts between the Circuits and the States with respect to the problems of income tax and inflation.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Illinois Supreme Court.

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APPENDIX

EXHIBIT A

Docket No. 43862—Agenda 54—May, 1971.

JO ANN RAINES, as special administrator of the estate of THOMAS RAINES, Appellant, v. NEW YORK CENTRAL RAILROAD COMPANY, Appellee.

MR. JUSTICE WARD delivered the opinion of the court:

In an action brought under the Federal Employer's Liability Act (45 U.S.C., sec. 51 *et seq.*), a jury returned a verdict of $750,000 for the plaintiff, Thomas Raines, against the defendant, New York Central Railroad Company. The defendant had acknowledged its liability and trial was had to resolve only the question of damages. On appeal the Appellate Court for the First District reversed and remanded for a new trial (129 Ill.App.2d 294). We granted the petition of the plaintiff for leave to appeal.

On May 18, 1967, the plaintiff, who was 28 years of age, was severely injured while coupling air hoses between a locomotive and a box car in a yard of the defendant. At the time the plaintiff had been employed by the defendant for but nine days. The injuries necessitated the amputation of both the plaintiff's legs at points close to the hips, and he was continuously hospitalized from May 18, 1967, to August, 18, 1967.

The defendant contended in the appellate court that the verdict was excessive and had resulted from jury passion and prejudice. It claimed that the trial court had erred in failing to instruct the jury that the plaintiff's award was not subject to income tax; that the trial court should have granted a mistrial or interrogated the jurors relative to a television program about personal injury lawyers which was shown during the trial and prior to the

jury's retirement; that the introduction of evidence relative to the plaintiff's pension rights under the Railroad Retirement Act had he been employed until the vesting of such rights was improper; and that testimony of the likelihood of a continuation of inflationary trends in the economy was erroneously admitted. The appellate court held that the trial court had committed error in allowing testimony relating to a continuation of inflationary trends and when it permitted the plaintiff to introduce evidence of retirement benefits he would have received had he continued to be employed by the defendant until retirement. The appellate court rejected the defendant's contention that the jury should have been instructed that the award was not subject to income tax and the court said that inasmuch as remandment for a new trial was to be ordered it would be unnecessary to consider the argument regarding the television program.

After we granted leave to appeal the plaintiff was killed, it would appear, in an automobile accident, and by order of this court Jo Ann Raines, as special administrator, was substituted as appellant and will hereafter be designated as plaintiff.

The same arguments the parties advanced in the appellate court are presented to us.

Considering the defendant's first contention, we judge that the trial court correctly refused an instruction that any award in favor of the plaintiff would not be subject to income tax. In *Hall* v. *Chicago and Northwestern Ry. Co.*, 5 Ill.2d 135, at 151-152, this court observed: "It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how the defendant acquires the money with which to pay the award, is of no concern to the court or jury. Similarly, whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tortfeasor has no interest in such question. And if the jury were to mitigate

the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified."

We are not persuaded by the defendant's second argument that the trial court should have interrogated the jury regarding the television program at the time it was reported by defense counsel to the court. The program, which was a network show, concerned trial lawyers. Six attorneys participated in the program, one of whom was a nationally known attorney specializing in personal injury matters. The discussants spoke of criminal trials and also contingent fees, influence of insurance companies on juries, and the personal injury lawyer told of large awards he had obtained. There was no reference to the plaintiff's case.

The following day the defendant's attorney advised the court of the program and requested a mistrial. The motion was denied and a motion was then made that the jurors be polled to determine the program's influence, it any, which motion was also denied. However, after the jury had returned its verdict the trial court inquired of the jurors as to whether any of them had seen the program. Three had seen the program but they stated it had not been discussed in the jury room. There is nothing to suggest the three jurors were influenced by their viewing the show.

We judge that the trial court correctly refused to poll the jurors as to whether they had seen the program at the time the request was first made by the defendant's attorney. To have done so would have only apprised those of the program who had been unaware of it and stimulated curiosity. After the verdict the court did poll the jurors and ascertained from the three who had seen it that it had not been discussed in the jury room. Considering the general character of the program and its remoteness from the case on trial, the trial court correctly considered that

there had not been prejudicial influence. The motion for a mistrial was addressed to the trial court's discretion and the court did not err in denying it.

In the cases offered by the defendant to support its argument, the prejudicial character of the matters involved seemed clear. In *West Chicago St. R.R. Co.* v. *Grenell*, 90 Ill.App. 30, 45, a newspaper article stated that the jury "*** on the former trial had been bribed," and that "*** the case [was] to be given another chance for 'justice'." In *Trohey* v. *Chicago City Ry. Co.*, 168 Ill.App. 1, two jurors brought into the jury room a newspaper which contained an article suggesting that defendant had engaged in jury tampering. In *Day* v. *Thomson*, 305 Ill.App. 29, the article reported prejudicial remarks by a trial judge regarding the good faith of defendant's attorneys. The three criminal cases cited, *People* v. *Hryciuk*, 5 Ill.2d 176; *People* v. *Malmenato*, 14 Ill.2d 52; *People* v. *Cox*, 74 Ill.App.2d 432, involved prejudicial comments about the accused.

The contention that the trial court erred in admitting evidence of pension rights the plaintiff would have enjoyed under the Railroad Retirement Act had he continued to work for the defendant is not well founded. To illustrate these benefits, an employee of the Railroad Retirement Board, Emil J. Oravec, testified that an employee, after ten years of railroad service, would become eligible for retirement benefits. Oravec testified that at the time of trial the maximum retirement benefits payable to a retired railroad employee with thirty years of service was $247 per month. He said that according to official projections, on the basis of average earnings of $650 per month, and reckoning from the time of trial, a railroad employee who would retire after thirty five years would receive $502 per month plus a $70 supplement. The supplement, however, was at the time of trial provided on a five-year trial basis and its continuation was uncertain.

The appellate court held, erroneously, we consider, that this evidence was too speculative to have been admitted.

The authorities offered by the defendant to support the appellate court's view did not involve the issue we consider. In *Eichel* v. *New York Central R.R. Co.*, 375 U.S. 253, 11 L.Ed.2d 307, 84 S.Ct. 316, which was relied on by the appellate court, the Supreme Court held that the trial court properly excluded evidence that the plaintiff was receiving a disability payment of $190 per month. The decision does not have force here, however, for the evidence had been offered by the defendant to show that the plaintiff's failure to return to work was due to malingering. The other cases advanced by the defendant (*Sinovich* v. *Erie R.R. Co.* (3rd cir. 1956), 230 F.2d 658; *Hetrick* v. *The Reading Company* (D.C.N.J. 1941), 39 F.Supp. 22; *Riley* v. *West Virginia Northern R. Co.* (1948), 132 W.Va. 208, 51 S.E.2d 119; *Missouri Pacific R.R. Co.* v. *Wellingham* (Tex.Civ.App. 1961), 348 S.W.2d 764; *Gilroy* v. *Erie-Lackawanna R.R. Co.* (S.D.N.Y. 1968), 279 F.Supp. 139; and *New York, New Haven & Hartford R. Co.* v. *Leary* (1st cir. 1953), 204 F.2d 461) are to the effect that a defendant may not mitigate damages by introducing evidence of the plaintiff's pension rights. They are not relevant here.

Raines offered the evidence of his lost pension rights in proof of the injury inflicted on his future earning capacity. The trial judge instructed the jury that plaintiff was entitled to the "present cash value of earnings reasonably certain to be lost in the future." The defendant made no objection to the instruction and does not quarrel with the measure of damages proposition the instruction embodies. The plaintiff argues that the pension rights he would have acquired under the Railroad Retirement Act are a part of the remuneration for continued employment with the railroad, that these benefits would have vested after ten years employment, and that he was forever deprived of them. Neither party cites a Federal Employer Liability Act case where the propriety of introducing lost pension rights as an element of damages was decided, but we note that in *Boston and Maine R.R.* v. *Talbert* (1st cir.

1966), 360 F.2d 286, the court in rejecting the defendant's contention that damages awarded to plaintiff were excessive, noted that: "[A]t age sixty-five he would have retired with a pension of $287.00 a month for the rest of his life and could have supplemented this amount by other employment." 360 F.2d 286, at 291. In other actions for personal injuries, courts have held that the introduction of lost pension rights is a proper element of damage. The Court of Appeals for the second circuit in *Cunningham* v. *Rederiet Vindeggen* (2d cir. 1964), 333 F.2d 308, applying *Healy* v. *Rennert* (1961), 9 N.Y.2d 202, 213 N.Y.S. 44, 173 N.E.2d 777, held that evidence of lost pension benefits was admissible. In *Groat* v. *Walkup Drayage and Warehouse Co.*, (1936), 14 Cal.App.2d 350, 58 P.2d 200, the court, in approving the admission of evidence of lost pension rights, said: "Although, at the time of the accident the accrual of respondent's right to a pension was contingent upon his further service for four years, and the amount that he would receive depended upon his subsequent length of life, yet he then had a present existing right to fulfill such contingencies, and any interference with his ability so to do constituted an invasion of such right. This right to mature a pension is somewhat analogous to the right of a person to work and earn in the future. Loss of future earning capacity has always been considered a proper element of damages. [Citations.] Respondent's loss of a future pension because his injuries terminated his employment four years before his right to a pension accrued was therefore a proper element of damages." 58 P.2d 200, 204.

The record shows that the plaintiff had a contingent right to pension benefits under the Railroad Retirement Act, which would have vested had he continued his employment for ten more years. Where the plaintiff had a presently existing but contingent right to a pension, evidence of that right was admissible to show part of his damages for loss of future earnings. Raines had testified that he intended to continue railroading, and it was for the jury to weigh this testimony.

The appellate court also held that the evidence of pension rights was inadmissible, as "this evidence was duplicative of other testimony which sought to compensate the plaintiff for lost wages over his life expectancy of 42.8 years, which would encompass his projected years of retirement." (129 Ill.App.2d at 305.) We do not think this observation was correct. There was, of course, no error in the admission of evidence of the plaintiff's life expectancy, and the defendant had introduced evidence that the plaintiff was likely to work for fewer years than his life expectancy.

Defendant's last contention is that the "verdict resulted solely from the jury's deep and understandable sympathy for the plaintiff and prejudice against the defendant railroad inflamed by plaintiff's counsel's incessant play on the jury's fear of inflation." The plaintiff had called Dr. John P. Henderson, a professor of economics at Michigan State University and labor economist, to testify that the economy was in an inflationary spiral, which in his opinion would continue. Defendant's counsel objected to this testimony on the sole ground that it was too speculative.

The witness, over objection, testified that on the basis of data compiled by the United States Department of Labor, the general trend of prices and wages in the United States from 1946-1966 was upward, and that the wages paid nonsupervisory railroad workers had increased an average of 5.3% per year, from $50 per week in 1946 to $135.65 per week in 1966. He testified that persons on fixed incomes were hurt more by price inflation than employed persons who could work. He stated that, in his opinion, price inflation would continue.

Edward McKinney, an investment banker, testified for the plaintiff that the buying power of the dollar had declined substantially from 1940 to 1967, so that the 1940 dollar had a value of $.42 in 1967. He also testified that we are in a high interest rate period, that interest rates have increased markedly since 1946, and that the increase

is indicative of the inflationary spiral. His opinion was that this inflationary spiral would continue.

Two witnesses, an actuary and an investment adviser, were called by defendant to testify to the rate of return presently available to an investor required to live from the proceeds of his investment. They apparently did not testify in rebuttal but were called as witnesses to the extent of plaintiff's loss of future earnings. Neither witness said, when cross-examined, that he considered inflationary forces when advising as to income producing investments.

The appellate court concluded that "the testimony prejudiced the jury in their deliberations." (129 Ill.App.2d 292, 304). However, the court did not hold, as the plaintiff vigorously argues, that the verdict was excessive.

Without acknowledging error in the admission of the evidence regarding inflation, the plaintiff contends, citing *Swigert* v. *Chicago B. & O.R.R. Co.*, 208 Ill.App. 98, 100; *Slovinsky* v. *Beasley*, 316 Ill.App. 273, and *Aledo Terminal Ry. Co.* v. *Butler*, 246 Ill. 406, 410, that reversal, if the admission of the evidence was improper, is called for only if the verdict was excessive and in this case the verdict was not excessive. The defendant would distinguish these cases on the ground that, although the courts there found harmless error, they did so because the appellant did not question the verdict as excessive. Here the defendant maintains that the verdict is excessive, and that its excessiveness is a consequence of the introduction of evidence of inflation. It has not, however, called attention to any decision holding that the simple assertion that damages are excessive precludes a finding of harmless error, even though the verdict is supported by other proper evidence.

This court in *Stoddard* v. *Illinois Improvement and Ballast Co.*, 275 Ill. 199, 205, refused to reverse a verdict in the plaintiff's favor for breach of a contract, because "the error was entirely harmless and did plaintiff in error no damage, as the small verdict of $2,500 damages clearly showed." In *Peoria, Atlanta & Decatur R.R. Co.* v. *Sawyer*,

71 Ill. 361, 363, where the plaintiff had sued for damages to land owned by him, it was held that error in the admission of evidence showing injury to the plaintiff's other land did not require reversal, since the award for the damage to the land injured by the defendant had ample support in the record. In neither *Stoddard* nor *Sawyer* did the court rest its refusal to reverse on the ground that the defendant had not claimed the damages were excessive. Other courts have not considered erroneously admitted evidence going to the extent of damages as reversible error where other proper evidence in the record supported the verdict, regardless of any claim by defendant of excessive damages. (*Western Fire Insurance Co.* v. *Woods* (1968), 165 Colo. 169, 437 P.2d 547; *Pattison* v. *Pattison* (1952), 207 Okla. 46, 247 P.2d 514.) In *Pattison*, for example, where the plaintiff sued for conversion, the court first held, contrary to the defendant's contention, that the evidence was sufficient to support the verdict. It then observed, "***had the trial court excluded the evidence objected to it is apparent that the result would have been the same. The error, if any, in admitting the evidence to which defendant objected is therefore harmless." 247 P.2d at 515.

We judge that if there was other proper evidence here sufficient to support the verdict, it will be unnecessary to examine the validity of the defendant's contention that the admission of evidence regarding future inflation resulted in an excessive verdict.

In considering the other support for the verdict we observe that the case was submitted to the jury with instructions to compensate plaintiff for six categories of damage. Included were the nature, extent and duration of the injury; the disability and disfigurement resulting from the injury; the pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.

There was extensive medical testimony regarding these elements of damage. Dr. William McNabola, a physician

retained by the railroad, testified on behalf of the plaintiff. He stated that he first saw the plaintiff when he was brought to St. Bernard's Hospital at 6:50 P.M. on May 18, 1967, the date of the injury. He said the plaintiff's right leg had been severed through the central portion of his thigh. His left lower leg had not been completely severed, but remained partially attached through some muscle tissue behind the femur or thigh bone. Both leg wounds were extensively contaminated with cinders and dirt. At his admission to the hospital it was found that his blood pressure had dropped drastically, so that it was necessary to take steps to raise the pressure by the injection of various intravenous fluids and the application of tourniquets to what remained of his thighs. Dr. McNabola testified that he had called Doctors Meany and Governale in consultation. On the advice of Dr. Governale, a specialist in vascular complications, the left leg was removed on the night of May 18. Dr. Governale had advised severance because of the extensive crushing, contamination and consequent infection of the leg, which created a serious risk of gas gangrene. Between May 18 and July 10 the plaintiff underwent eight separate operations for the removal of dead bone and other tissue and procedures for the placement of split-thickness skin grafts over the open wounds. The skin for the grafts had a tissue paper diameter, and was taken from the plaintiff's upper thigh and abdomen.

Dr. Robert P. Meany, an orthopedic surgeon, testified that he had continued to treat Raines up to the time of trial. He said that after the plaintiff's admission to St. Bernard's on May 18, he had developed a toxic condition from the absorption of dead skin. This toxicity made him semi-comatose. Between May 18 and May 21 his temperature was highly elevated, reaching 105 degrees at times. His stumps became infected and the infection was so severe, Dr. Meany testified, that it was necessary to apply Dakon's solution, a medicated solution containing chlorine. Dakon's solution, which disinfects and promotes healing

tissue, is an irritant, and causes pain when put on a raw, sensitive area.

During the plaintiff's stay at St. Bernard's, Dr. Kurth, a specialist in skin grafting, performed several operations, covering the raw areas with split-thickness skin grafts. The aim was to prevent the loss of body fluids, and to promote healing. The effect of removing skin from plaintiff's abdomen, hips and thighs for the graft was to leave these areas raw and painful.

The plaintiff required continuous nursing services. Dr. Meany testified that the plaintiff had experienced intense pain. The slightest movement of the stumps would cause pain, so that it was necessary to use sandbags as splints. The severity of pain was sometimes manifested by an involuntary, spasmodic jumping of the stumps.

Raines also suffered what Doctors Meany and McNabola called phantom pains—that is, even though the legs were severed, he complained of pain in his feet and toes. Phantom pains are not uncommon in these kinds of amputations, Dr. Meany testified, and result from the cutting of the femoral and sciatic nerves, which have their origin in the spinal cord.

Dr. Meany testified that he continued to treat the plaintiff after July 24, 1967, when he was transferred to the Little Company of Mary Hospital. The infection and drainage from the stumps continued, though less severely, at Little Company of Mary, where he remained until August 18, 1967.

Dr. Meany last examined the plaintiff two or three weeks before trial, which began on April 23, 1968. He found evidence of continuing infection in the left stump. The witness was unable to estimate how long the infection might persist. He stated that the patient required further treatment which would necessitate further hospitalization. The further treatment would be to clear up the

infection and to shorten the stumps in an effort to get soft pliable skin over them preparatory to an attempt to fit the plaintiff with a prosthesis.

Dr. Horace E. Turner and Dr. Wayne Slaughter also testified in behalf of the plaintiff. Dr. Turner, an orthopedic surgeon with experience in the treatment of amputees, testified that he had examined him approximately one week before the trial, and he had taken certain X rays, which were introduced into evidence. The pictures showed that approximately four inches of right thigh bone and 3½ to 4 inches of left thigh bone remained. They also showed a sequestra, indicating an osteomyelitis. He stated that osteomyelitis heals very slowly, and that it was possible the patient's condition would be permanent. Spurs also appeared on the left femur, and failure to remove them, he stated, would reduce the chances of clearing the infection and would cause pain if the plaintiff were to be fitted with a prosthetic appliance. Before the plaintiff could be fitted with prostheses, it would be necessary to further revise both stumps, and bring soft tissue down over them by traction. In Dr. Turner's opinion the split-thickness grafts then on the stumps would not bear the weight of a prosthesis. When asked whether he knew of cases where an artificial limb was placed on an area where the bone protruded, he stated that although he had seen and heard of such attempts, he had never seen it done successfully.

Dr. Turner further testified that the usefulness of an artificial limb is proportional to the length of the stump on which it is placed, and one cannot readily move the appliance with stumps as short as those of the plaintiff. Given the extent of this amputation, a prosthesis on the right leg would be useless. At best, the witness said, the plaintiff would always be obliged to use crutches to retain his balance, and he would always suffer some pain. He would periodically have to have the prostheses changed.

Substantially the same medical opinion was given by Dr. Slaughter, who is the chairman of the Department of

Plastic Surgery at Loyola University Stritch School of Medicine. He stated that in his work he has contact with paraplegics and amputees, and is in charge of a ward of amputees and paraplegics at the Hines Veterans Administration Hospital. He had examined the plaintiff on April 1, 1968, and concluded that he had osteomyelitis in the left stump which would have to be cleared up before he was fitted with prostheses. In addition, both stumps would have to be further shortened, and traction applied so as to bring down full thickness, weight bearing tissue. In his opinion, split-thickness grafts, which are only 10/1000 to 16/1000 of an inch and contain no subterraneous fat, would not support a prosthesis. At most, in his opinion, the plaintiff could hope for only limited mobility.

The only medical witness to testify for the defendant was Dr. Robert G. Thompson, a specialist in orthopedic surgery and consultant to the Rehabilitation Institute of Chicago. He had examined the plaintiff twice, the first time as consultant and the second time in preparation for trial. At the request of the defendant Dr. Thompson had seen the plaintiff in July, 1967, at St. Bernard's Hospital. At that time he recommended his transfer to the Chicago Wesley Memorial Hospital, where he planned to perform further surgery. He intended to transfer the plaintiff later to the Rehabilitation Institute, so that "*** hopefully, we could fit him for a prosthesis and start him on his ambulation training."

On July 24, 1967, plaintiff was transferred to Wesley where he remained less than 24 hours. The witness did not see him that day, but had a telephone conversation with him. He testified that the patient expressed displeasure at having been placed in a ward without air-conditioning, and said that he wished to remain under the care of Dr. Meany. Dr. Thompson had suggested that he communicate with Dr. Meany, which plaintiff had done and had been transferred to the Little Company of Mary Hospital.

Dr. Thompson next saw the plaintiff in his office on April 1, 1968. He testified he found that the right stump had healed except for one small area where the bone was slightly eroded, but that it was not infected. The left stump was not completely healed and would require further shortening. He also observed some drainage from the left stump, but in his opinion this evidenced only a surface infection. On cross-examination, however, he said he had not taken any X rays of the plaintiff's stump. Sequestra appearing in an X ray of stumps, he admitted in response to a question, was one of the "classical findings" of osteomyelitis.

On the basis of his examination of April 1, it was Dr. Thompson's opinion that the plaintiff could be fitted with a prosthesis on his right stump and could begin standing between parallel bars. The left side, however, had not healed sufficiently to accept a prosthesis. He stated that the plaintiff could be fitted with prostheses on both legs approximately three or four months after both stumps had healed. This would be a new type of prosthesis, a socket-type, which is held on by means of a belt around the waist. At most, the plaintiff could hope to walk in and out of the bathroom and other short distances with the assistance of two canes, and get in and out of a wheel chair. The witness admitted that split-thickness grafts do not furnish a good basis for a prosthesis, and that they have a tendency to break down. Another obstacle to fitting the plaintiff with a prosthesis was the flexion contracture he suffered, a condition in which the hip is drawn upwards towards the abdomen.

Relative to the reasonable expense of prior medical care of the plaintiff and the present cash value of medical treatment reasonably certain to be received in the future, the record shows that until July 24, 1967, when plaintiff transferred to the Little Company of Mary Hospital, the defendant paid for his medical treatment. From July 24 until trial, the plaintiff had incurred medical expenses of $3,647.84. The cost of immediately necessary future sur-

gery, Dr. Turner testified, would be $1,000 for the left leg and $500 for the right one; future medical attention, hospitalization, and medical care would run the plaintiff "well over $50,000."

On the question of the value of earnings lost and the present cash value of future earnings lost, there was no evidence of the plaintiff's rate of compensation. However, for the days he actually worked between May 9, 1967, and May 18, 1967, he had earnings of $330.56. Dr. Henderson, the economist, testified that this would amount to a rate of $275.45 for a 5-day week, which projected 48 weeks to the date of trial, totaled $13,221.60.

Bernard Glynn, who was the local chairman of the Brotherhood of Railroad Trainmen at the Englewood yard, where the plaintiff worked, testified that he could have averaged three to six hours of overtime work per week had he continued in his employment.

Both the parties introduced testimony to ascertain the present cash value of plaintiff's anticipated future earnings. Witnesses testified to the amounts needed to return $1,000 for differing number of years at rates of 4%, 5% and 6%. The estimates ran from $20,548.94 at 4% for 41.8 years (plaintiff's life expectancy) to $14,787.29 for 34.14 years (his expected work life) at 6%. According to the various witnesses, the evidence was that the present cash value of the plaintiff's future earnings was approximately $185,000 to $225,000.

There was evidence that after the plaintiff was released from the hospital, a friend, James Elmund, moved into his home in order to assist him. The plaintiff's wife was a slightly built woman of 105 pounds, and plaintiff testified that Elmund had to help him in and out of bed, to the front room chair, to the bathroom and up and down stairs. Both Raines and Elmund testified that Elmund had come to live with Raines at his request, and that Elmund was forced to quit his employment at the American Metal Decorating Company, where he was earning $125 per

week. Elmund had lived continuously in the plaintiff's home since August 18, 1967, and Elmund testified that it appeared necessary for him to live there, as the plaintiff could not care for his three children when his wife was absent. He testified that he had originally gone to live with Raines out of friendship, but that the plaintiff had desired to pay him for his services. At the time of the trial he had not received any compensation.

Relative to future nursing care, there was evidence that the plaintiff would require assistance throughout the remainder of his life. Dr. Turner testified that he would have toilet problems and would need someone to assist him in getting in and out of bed.

Considering the evidence presented, including that of loss of anticipated earnings for a lifetime, of the pain and suffering, of the grievous nature of the injuries, of the anticipation of certain discomfort and expenses, and of the prospect of only minimal restoration, we judge that, apart from any evidence of the diminution of the award through inflation, the verdict was amply supported. The award was high but the claim of excessiveness is not warranted. The reliance one can place on comparisons is somewhat tenuous, but we would note that in *Moore* v. *Jewel Tea Co.*, 46 Ill.2d 288, a $900,000 award to a housewife who was blinded was not questioned as having been excessive. One cannot certainly assess in financial terms these human tragedies, but one can conclude that the award here was not excessive.

For the reasons given, the judgment of the Appellate Court, First District, is reversed and the judgment of the circuit court of Cook County is affirmed.

Appellate court reversed;
circuit court affirmed.

EXHIBIT B

RAINES v. NEW YORK CENT. R. CO.
129 Ill App2d 294

MR. JUSTICE ADESKO delivered the opinion of the court.

This is an appeal from a judgment rendered in the Circuit Court of Cook County which was entered upon a jury verdict in favor of plaintiff in the sum of $750,000. This action was brought under the Federal Employers' Liability Act (45 USC, § 51 et seq.), for the recovery of damages for plaintiff's personal injuries which he incurred while employed as a switchman by defendant. The defendant railroad admitted liability and the case was submitted to the jury solely on the question of damages.

The defendant seeks a reversal and a new trial based upon errors that it asserts were prejudicial to the defendant. Basically, the contention is that the jury's verdict is excessive and that this court must grant a new trial on the issue of damages. Underlying this contention, the defendant asserts that the trial judge erroneously admitted evidence which prejudiced the jury and resulted in the excessive verdict. Furthermore, defendant contends that the trial court erred in refusing to instruct the jury as to the fact that the plaintiff's award would not be subjec to income tax and that the trial court improperly refused to grant a mistrial because of the alleged prejudice resulting from a television broadcast.

Plaintiff contends that the question of excessiveness of the verdict cannot be reviewed by the court and relies upon the case of Hack v. New York, C. & St. L. R. Co., 27 Ill App2d 206, 169 NE2d 372 (1960), where the court discussed the propriety of a State reviewing court's power to consider a question of manifest weight of the evidence in a Federal Employers' Liability Act case. The court stated, at pages 215-16:

> "It has repeatedly been held that a reviewing court in such cases cannot reweigh the evidence. Probably a better statement of that rule would be to say that a reviewing court has no right to consider the evidence and from that consideration determine as to whether or not the verdict of the jury was against the manifest weight of the evidence. The only question presented . . . is as to whether or not there is an evidentiary basis for the jury's verdict, and when such evidentiary basis becomes apparent the appellate court's function is exhausted."

The defendant in Hack was contending that the jury's finding of negligence was erroneous and did not question the amount of the verdict. The Hack case conforms with the decisions in Lavender v. Kurn, 327 US 645 (1946) and Gallick v. Baltimore & O. R. Co., 372 US 108 (1963).

Plaintiff argues that the rule of review with regard to manifest weight questions is equally applicable to a question regarding the excessiveness of the verdict. In this respect, the case of Grunenthal v. Long Island R. Co., 339 US 156 (1968), is relied upon by plaintiff. The United States Supreme Court reversed a Court of Appeals decision which had ordered a remittitur from a jury verdict rendered in a federal district court action under the Federal Employers' Liability Act. The defendant railroad had appealed on the basis of an excessive verdict. The petitioner (plaintiff in the district court) contended that the Court of Appeals had exceeded its powers of review by reasons of the Federal constitutional provision of the Seventh Amendment or that such review was prohibited by the statute itself. The Court did not decide on either ground, expressly holding that the trial judge's action should not have been disturbed since there was no abuse of discretion in accepting the jury's verdict. This was the standard of review relied upon by the Court of Appeals in Grunenthal, which was expressed in Dagnello v. Long Island R. Co., 289 F2d 797 (1961). The Grunenthal decision concluded that on the Court's appraisal of the

evidence, the trial court did not abuse its discretion in accepting the jury's verdict.

From the above, it is evident that the contention raised by plaintiff was not decided in any of the above cited cases. The defendant has asserted that the case of Smith v. Illinois Cent. R. Co., 29 Ill App2d 168, 172 NE2d 803 (1960), disposes of this contention. That case expressly held that a reviewing court of this State could decide a question of the excessiveness of a jury's verdict under a Federal Employers' Liability Act case. The appellant railroad contended that the Appellate Court could decide questions of excessive verdicts but could not rule upon the question of the weight of the evidence. This court agreed and reasoned that the reviewing courts of this State followed the common law rule that if a trial court improperly failed to enter a remittitur or grant a new trial, a reviewing court could correct the judgment if warranted. See also Crowley v. Elgin, J. & E. Ry. Co., 1 Ill App2d 481, 117 NE2d 843 (1954). The Smith case stated that the question of an excessive verdict was controlled by the law of the forum as a procedural matter. Further, the Smith case noted that the Federal judiciary would lack the power to pass on the issue due to constitutional prohibition in the Seventh Amendment and that the issue involved a question of fact that was beyond the purview of a federal substantive question.

[1] We are of the opinion that the rationale of the Smith case is controlling the issue before this court. We think there is a reasonable distinction that restricts appellate review of a jury's determination as to the manifest weight of the evidence under the Federal Employers' Liability Act, but allows a reviewing court to consider a question of excessive verdict based on common-law principles. We conclude that this court has the power to consider the propriety of the trial court's judgment regarding damages awarded by the jury's verdict. The defendant's contention is that the jury's verdict was the result of passion and prejudice. This court has the power to

review the evidence and pass on such a question, regardless of the fact that plaintiff's right of action is based on the Federal Employers' Liability Act.

A brief summary of the facts shows that on May 18, 1967, the plaintiff sustained injuries while engaged in coupling air hoses between a locomotive and boxcar in defendant's railroad yard. The accident resulted in the amputation of both legs. He was taken to a hospital and underwent surgery on May 18, and on several subsequent occasions. The operations performed were initially of an orthopedic nature and later the plaintiff underwent several operations for plastic surgery, consisting of skin grafts. Plaintiff was under continual nursing care and was given various drugs for pain. In July of 1967, the defendant employed a surgeon with the intent of possibly rehabilitating plaintiff by undertaking further operations to fit plaintiff with prostheses. Plaintiff refused such treatment and was eventually discharged on August 18, 1967. Defendant has paid all expenses of treatment up to the date in July, when plaintiff refused treatment as to the artificial limbs.

Approximately one year later, trial was held on the issue of damages. Evidence was presented by medical testimony of plaintiff's past, present and future condition relating to rehabilitation, to the permanent nature of his injuries and to his pain and suffering. Testimony was produced concerning the plaintiff's family consisting of a wife and three children, his educational history and his work record. His employment with defendant commenced on April 29, 1967, as an extra board switchman, in which he earned $330.56 up to the date of his accident on May 18, 1967. His prospects for future earnings as an employee were examined. Evidence of his past and future medical expenses was introduced. The record discloses that both parties presented a great deal of expert testimony from medical and economic witnesses regarding the amount of damages that the plaintiff was entitled to by reason of this occurrence. The testimony dealt with as-

pects of past and future loss of wages. Both parties introduced testimony regarding the most advantageous economic means to compensate plaintiff in damages. Plaintiff's life expectancy was established as 42.8 years.

With regard to the contention that improper evidence was admitted, the defendant asserts that improper testimony as to the future of economic inflation and testimony regarding railroad retirement benefits served to arouse the passion and prejudice of the jury in arriving at the damage award. We will discuss these categories of evidence separately.

The evidence of future inflation was elicited by plaintiff's counsel on direct examination of his own witnesses, cross-examination of defense witnesses and in rebuttal during the trial. The first instances occurred in plaintiff's case-in-chief, when John P. Henderson testified as an economics expert. There was no question as to his qualifications in his profession. The witness testified as to past trends in the economy, describing inflation, the increase in prices and wages, and the devaluation of the purchasing power of the dollar. On direct examination he gave the opinion that the inflationary spiral would continue to affect the price level by an estimated 2-4 percent per year. His reason for this opinion was because of a monetary policy which believes that some amount of inflation was desirable to stimulate prices. He also gave an opinion of the future of interest rates for the next 30 years, stating that a return to a peacetime economy would lower interest rates. Henderson also considered the devaluation of the British pound, which he said would cause the formal devaluation of the dollar after the 1968 election, that would, in turn, cause domestic inflation.

Edward McKinley was called as a witness for the plaintiff. He was an experienced investment banker. He testified as to past trends of inflation and dollar devaluation. He also gave the opinion that the inflationary spiral of increased cost of goods and wages would continue. The

rebuttal of Edgar D. Tripple, who was an insurance salesman for a company that promoted annuities, also mentioned aspects of future inflation. Tripple stated that an annuity was not a hedge against inflation, but that variable annuity plans would meet the contingency of future inflation.

Two of the defense witness were cross-examined as to the effect of inflation. Thomas C. Smith, who worked in the area of private pension plans, said that estate plans did not consider dollar devaluation nor inflation; also that long-term bond investments would not cope with inflation and that the witness would not buy bonds if prices rose and dollars were cheaper. Similarly, Edward J. Mullen, a professional actuary in the pension field, stated that in annuity computations, no provision is made for inflation except if a variable annuity is used. This testimony from the defense witnesses was in response to an inquiry of plaintiff's counsel as to the subject of inflation.

Defendant argues that the trial court erred in permitting this testimony to be admitted in evidence. The contention is that such testimony is speculative and conjectural, and that it aroused the jury's passion and prejudice in reaching this award. Plaintiff maintains such testimony is competent evidence that serves to give the jury a meaningful standard with which to assess damages. Plaintiff also asserts that the expert testimony served to describe this economic problem with regard to loss of future earnings and that the concept of inflation is common knowledge which can be considered, even if not proved by evidence.

We think the issue involves a question of first impression in this state. The question is: Whether evidence of future inflationary trends in the economy are admissible to a jury as an element to be considered in assessing damages? Stated another way, is such evidence so speculative and conjectural as to influence a jury's verdict improperly as to damages?

Plaintiff relies upon Grunenthal v. Long Island R. Co., supra, where the United States Supreme Court cited the trial judge's remark that an award for future wages was based on unrefuted testimony regarding steady increases in future wages that were likely to continue. As stated earlier, the decision in Grunenthal involved the question of whether the Federal District Court abused its discretion in approving the award as found by the jury. No issue as to the prejudicial nature of testimony as to future inflation was raised in that decision. The plaintiff's reliance on this case is easily distinguished from the instant case. The cases from other jurisdictions dealing with the question of loss of future earning capacity, where an individual had no present economic base at the time of injury or wrongful death, are also easily distinguishable. In those cases, the injured individual must be considered as having an undetermined future earning capacity that will increase. Thus, speculative evidence is allowed in order to aid the jury in determining what a person's possible earnings might have been. Krohmer v. Dahl, 145 Mont 491, 402 P2d 979 (1965); Complete Auto Transit, Inc. v. Rees (Okla), 425 P2d 465 (1967). The above cases do not allow testimony of future economic inflation as an element of damages, since the loss of future wages must be expressed in the present value when the verdict is reached.

Plaintiff seeks to persuade this court by reliance upon the well established rule that a reviewing court will take judicial notice of the decline in purchasing power of money in considering an issue of excessive damages. Downs v. Baltimore & O. R. Co., 345 Ill App 118, 102 NE2d 537 (1952); Howard v. Baltimore & O. C. T. R. Co., 327 Ill App 83, 63 NE2d 774 (1945); Milis v. Chicago Transit Authority, 1 Ill App2d 236, 117 NE2d 401 (1954); Smelcer v. Sanders, 39 Ill App2d 164, 188 NE2d 391 (1963); Breswell v. New York, C. & St. L. R. Co., 60 Ill App2d 120, 208 NE2d 358 (1965). This rule has been recognized as cogent when a party on review seeks to compare other

damage awards from the past as relating to damages in a given case. Reviewing courts have used judicial notice of inflation in justifying larger damage awards based on similar factual situations. This is not the issue before us. Similarly, the above rule has been applied to show that a jury may consider the effect of inflation from the date of injury to the date of verdict. The above cases of Downs, et al., do not justify a jury in considering the effect of possible future inflationary trends.

In Harper & James, The Law of Torts, Vol 2, § 25.11 (1956), the problem of inflation as an element of damages has been examined. The authors state that juries have been allowed to consider changes in living cost from the time of an accident to the time of trial. With regard to the consideration of inflation as to future losses, the text states:

> "Greater confusion surrounds present damages for future loss. Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part, the problem—which is inevitably present in every case of future loss—is not analyzed and the present value of money is assumed to be the proper basis."

Other jurisdictions have generally considered evidence of future inflationary trends as speculative, and therefore incompetent evidence for a jury's consideration. In Armentrout v. Virginian Ry. Co., 72 F Supp 997 (1947), the fluctuation of the purchasing power beyond the date of verdict was considered speculative and not proper for the jury's determination of lost future earnings, which should be based on present economic facts. In Zaninovich v. American Airlines, Inc., 26 App Div2d 155, 271 NYS2d 866 (1966), a wrongful death action, the unpredictable nature of future inflation was characterized as "amateurish speculation." Only one case has been found to the contrary. In Henwood v. Moore (Tex), 203 SW2d 973 (1947), a reviewing court considered an issue of excessiveness of verdict. That court, without supporting authority, indulged in the presumption that the devaluation of the dollar would continue and that income taxes would be materially reduced. This presumption was not considered in the context of evidence to the jury.

[2] We are of the opinion that the use of evidence concerning future inflationary trends and the questions concerning the difficulty in hedging inflation were erroneous. Based upon the above examination of authorities, we conclude that such evidence should have been excluded by the trial court. The testimony served to prejudice the jury in its deliberations. Despite plaintiff's assertion that inflation is a matter of common knowledge, the law of this State has always been that certain elements of damages (for personal injuries) must be estimated by the jury at their present value.

Defendant has also complained of evidence introduced by plaintiff regarding retirement benefits. Plaintiff called Emil J. Oravec, a contact representative of the Railroad Retirement Board which administers the Federal Act for railroad employees. This Act serves to substitute for Social Security benefits, in that once a railroad employee has 10 years of service, he is qualified under the Railroad Retirement Act and will no longer be eligible to receive

benefits from Social Security. Oravec testified as to the benefits that might be receivable by an individual who continued as a railroad employee for a number of years in the future. The witness also testified as to hypothetical estimates of retirement benefits and of the future contributions that may be made by railroad employees.

The defendant's contention is that such evidence is inadmissible. The cited authorities announce the rule that defendants will not be allowed to introduce railroad retirement benefits to prove such facts as extent of disability, malingering or as mitigation of damages. Eichel v. New York Cent. R. Co., 375 US 253 (1963); New York, N. H. & H. R. Co. v. Leary, 204 F2d 461 (1953), cert denied, 346 US 856. The rule has also been applied to bar a plaintiff from introduction of such evidence to prove an injured party's disability. Gilroy v. Erie Lackwanna R. Co., 279 F Supp 139 (1968). Plaintiff seeks to distinguish these cases because of the purpose for which the testimony was introduced. Plaintiff's argument is that the loss of a railroad retirement pension was a part of his pecuniary loss as a contingent right to future compensation beyond retirement. The case of Groat v. Walkup Drayage & Warehouse Co., 14 Cal App2d 350, 58 P 2d 200 (1936), allowed evidence of a contingent right to a pension where a police officer had been permanently disabled. The injured party lost his right to a pension which would have accrued in four years from the date of his injury. The contingent right to a pension was considered analogous to loss of future earning capacity.

The Groat case is only persuasive authority and it dealt with a situation where the probability of the accrual of a pension was great. In the instant case, the plaintiff had just begun to work for the railroad. Despite his assertions of his intention to continue as a railroad employee, his work record weighs against such a state of facts. It was undisputed that he would have to work at least 10 years for the railroads before being eligible for benefits. We think there is little similarity of plaintiff's

position to that of the plaintiff in Groat, supra. We feel that such evidence was erroneous as being too speculative. Furthermore, we agree with defendant's contention that this evidence was duplicative of other testimony which sought to compensate the plaintiff for lost wages over his life expectancy of 42.8 years, which would encompass his projected years of retirement. Plaintiff could not be entitled to both the compensation for lost earnings and possible retirement benefits by virtue of the pension.

[3, 4] Accordingly, we hold that the trial court committed reversible error in admitting testimony of future inflationary trends and the testimony as to retirement benefits was similarly erroneous. We feel that this testimony prejudiced the jury in their deliberations as to the amount of damages to be awarded to plaintiff. This prejudice will necessitate a new trial on this issue. The question of the prejudice caused by the television program will be moot on retrial. As to the remaining issue of failing to instruct the jury that the award would not be subject to income tax, we say that such an instruction is not proper.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

Judgment reversed and remanded.

BURMAN, P.J. and MURPHY, J., concur.

EXHIBIT C

The plaintiff's examination of his own economist, John P. Henderson, was as follows:

"Q. Now, Doctor, you have testified that in your opinion, the inflationary spiral that we are in, will continue, is that not right, sir?

A. That's correct.

Q. For how long a time?

A. Well, I don't think—I think that prices will continue to rise.

Q. For how long?

A. There is no reason why they can't continue to rise indefinitely.

Q. Forever?

A. Yes." (R 430)

and again

"Q. And in your opinion, based upon 20 years or more experience in the investment business, do you have an opinion as to whether or not this inflationary spiral, the increase in the cost of goods and in the cost of living and the cost of wages and the rate of wages is going to continue?

A. I would think it would continue, yes.

Mr. Dooley: That's all." (R 514)

Other questions to Mr. Henderson by plaintiff's attorney were as follows:

"Q. All right. Doctor, in the very nature of our economy when prices go up, do wages follow?

A. Most wages, but not all wages.

Q. All right. And, doctor, is that what you call inflation?

A. This is, yes. This is inflation. This is one way of defining inflation, yes.

Q. And, doctor, with reference to inflation, etc." (R. 364)

• • •

"Q. Doctor, at the present time is our economy in this inflationary spiral?

A. Yes. Prices rose last year more than they did the year before. Our economy is in this inflationary spiral.

Q. And, Doctor, do you have an opinion based upon a reasonable degree of certainty in the field of economics as to whether or not we will have a continuous increase in prices? * * * (R. 379)"

* * *

"Q. Let me ask you this: Last year was there a devaluation of the pound?

A. That's correct.

Q. And what is meant by a 'devaluation'?" (R. 447-448)

* * *

"Mr. Dooley: Q. Now Doctor, insofar as we are concerned and I am talking about we in the United States and you economists, would you tell us whether or not there is or is not a trend toward a formal devaluation of the dollar after the 1968 election?

A. If I were a betting man, I would bet that would happen.

Q. And when you talk about a formal devaluation of the dollar, what do you mean?

A. Well, we will let the price of gold rise and the value, therefore, of the American dollar of the other country's will decline and inflation of prices will rise domestically." (A 447-449)

Another of plaintiff's witnesses, Mr. Edward McKinley was asked:

"And with inflation what happens to bond prices? And what happens to them? (R 514)."

* * *

A defense witness, Mr. Thomas C. Smith, was cross examined as follows:

"Q. And when you plan estates, do you take into consideration the devaluation of the dollar?" (R 615)

* * *

"Q. And do you not take into consideration anything concerning inflation?" (R 615-616)

On re-cross examination Mr. Dooley again returned to the question of inflation with the witness, Thomas Smith, by asking the following question:

"Q. And insofar as a bond is concerned, the long term bond cannot cope in any way with changes in our economy by means of inflation?" (R 633)

Another of defendant's witnesses, Edward J. Mullen, was asked the following questions:

"Q. And in connection with your computations, there is no provision whatsoever made for the devaluation of the dollar?" (R 690).

And again at R. 697 Mr. Dooley asked:

"Q. In connection with your pension plans, do you attempt to allow for inflation?"

In direct examination of plaintiff's witness, Edgar D. Tripple, Mr. Dooley asked his witness:

"Q. With reference to annuity tables, let me say inflation. Are you familiar with that?

A. Very much so.

Q. And would you tell us whether or not annuity is a hedge against inflation?

A. It is none whatsoever" (A 777).

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AED

STATE OF ILLINOIS

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CLERK OF THE SUPREME COURT

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JUSTIN TAFT
CLERK

May 25, 1972

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525-2000

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No. 43862 - JoAnn Raines, as Special Admr., etc., appellant, vs. New York Central Railroad Company, a corp., appellee. Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

Petitioner,

vs.

JO ANN RAINES, as Special Administrator of the Estate of Thomas Raines, Deceased,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFATORY NOTE.

Analysis of the Petition makes manifest the want of reason for its allowance. While it contains broad statements about purported conflicts between the opinion of the Illinois Supreme Court and other courts, it will be demonstrated none exist. The sole issue was the amount of damages due the employee. The trial judge approved the verdict. The intermediate court of review which re-

versed did not find the award to be excessive. Nor did the state Supreme Court. Hence the novel and unprecedented reasons urged are moot.

The Illinois Supreme Court followed the mandate of this court when a claim of excessiveness is made. It made a detailed appraisal of the evidence on this issue to determine whether allowing the jury's award to stand would be a denial of justice. (*Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 159 (1968).)

The simple question presented here may be framed thus: Is this Court to interfere with the verdict of a properly instructed jury based on competent evidence and not found excessive by the trial court or the two state reviewing courts, solely to decide contentions of petitioner which have already been determined adversely to it in multiple other precedents?

REASONS FOR DENIAL OF THE PETITION.

Petitioner's sketchy factual statement requires an addendum. In the interest of simplicity it should be noted that:

1. The Illinois Supreme Court followed the mandates of this Court;

2. Evidence of the pension was admissible under Federal law as part of the element of future loss of earnings;

3. Evidence of future pay increases as well as rising prices is held admissible by all courts with the exception of the intermediate Illinois Appellate Court, which was reversed by the Illinois Supreme Court; petitioner has given this Court no authority;

4. The question of income taxation is no longer open to dispute.

The only issue in this case was the amount of damages. The verdict of the jury was approved by the trial judge and hence any reviewing court's scope was very limited. Moreover, no court, trial, or review, found the verdict excessive—a circumstance which renders moot petitioner's novel arguments.

Future damages were reduced to present worth. All witnesses, whether for petitioner or respondent, testified in terms of present value.

> "Both the parties introduced testimony to ascertain the present cash value of plaintiff's anticipated future earnings. . . . According to the various witnesses, the evidence was that the present cash value of the plaintiff's future earnings was approximately $185,000 to $225,000." (p. 15a, Pn.)

So also the jury was admittedly properly instructed and directed to reduce to present cash value future earnings.

> ". . . The trial judge instructed the jury that plaintiff was entitled to the 'present cash value of earnings reasonably certain to be lost in the future.' The defendant made no objection to the instruction and does not quarrel with the measure of damages proposition the instruction embodies." (p. 5a, Pn.)

Petitioner has set forth in an Appendix (Exhibit C) portions of testimony but has not advised the Court that that was without objection. Under Illinois law the failure to object precludes questioning the admissibility of the evidence on appeal. *Goldberg* v. *Capital Freight Lines,* 382 Ill. 283. Nor has it advised this Court of its want of complaint in its post-trial motion of the excerpted matter of inflation. (A. 11-20)

An Illinois Statute requires:

> ". . . the post trial motion must contain the points relied upon, particularly specifying the grounds in support thereof. . . . A party may not urge as error on review of the ruling on his post-trial motion any point, ground or relief not particularly specified in the motion." (Sec. 68.1, Ch. 110, Ill. Rev. Stats.) (See *Moore* v. *Jewel Tea,* 116 Ill. App. 2d 109, 119, 120; *Manno* v. *Stein,* 99 Ill. App. 2d 398, 241 N.E. 2d 691; *Perez* v. *B. & O. R. Co.,* 24 Ill. App. 2d 204, 210, 164 N.E. 2d 209, 212.)

The Appellate Court noted:

> "Both parties introduced testimony regarding the most advantageous economic means to compensate plaintiff in damages." (p. 21a, Pn.)

It, itself, introduced evidence of which it complains. The trial judge noted in overruling Respondent's objection to certain evidence offered by Petitioner:

> "Everybody has introduced factors, interest rates, and so on, and fluctuations in markets. Therefore, I am going to permit him to testify as to what it would cost to purchase from the high class company, a policy that would give him $1000.00 per year and take away all the risk." (R. 721)

A party who introduced evidence of the same character cannot complain. (*Supolski* v. *Ferguson & Lange Co.*, 272 Ill. 82, 89.)

A Railroad Retirement Board representative stated that there was fixed by law the monthly annuity that a person would receive who would retire after thirty years. Petitioner would seek to equate rising prices and wages and a pension after thirty years' service with federal income tax. It confuses the fundamental principle of the law of damages to restore the injured party as nearly as possible to the position he would have been in had it not been for the wrong inflicted. Income tax is a matter between the citizen and his government and Congress has given the injured and the tortfeasor certain benefits.

THE ILLINOIS SUPREME COURT FOLLOWED FEDERAL LAW.

There is no question that in an action under the Federal Employers' Liability Act federal law governs. Contrary to petitioner's statement (pp. 3, 4, Pn.) the intermediate state court of review did not follow "the unanimous decisions of all previous cases."

Nor did the Appellate Court, as petitioner represents (pp. 3, 4) follow the "unanimous decisions of all previous cases."

On the contrary it is without precedent and is contrary to federal law and the function of a reviewing court on this question. (*Grunenthal* v. *Long Island R.R. Co.*, 393 U.S. 156, 160; *Taylor* v. *Washington Terminal Co.* (D.C. Cir.) 409 F. 2d 145, 148; *Dagnello* v. *Long Island RR. Co.* (2 Cir.) 289 F. 2d 797, 806.) Instead it relied upon

a 1960 Illinois Appellate Court opinion. (*Smith* v. *Illinois Central R. Co.*, 29 Ill. App. 2d 168, 172 N.E. 2d 803.) (p. 19a, Pn.)

The Illinois Supreme Court is in nowise contrary to any decision of this Court. That court did not accept petitioner's contention that the verdict was the result of passion and prejudice. It found, separate and apart from petitioner's contentions, there was adequate evidence to support the verdict. (pp. 9a-16a, Pn.)

The object of the law of damages is to restore the injured party as nearly as possible to the position he would have been in had it not been for the others wrong. Juries are allowed to act upon probable and inferential as well as direct proof; any other rule would allow the wrongdoer to profit at the victim's expense. (*Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264, 265.)

The reviewing court must give the benefit of every doubt to the trial judge. (*Dagnello* v. *Long Island RR. Co.* 289 F. 2d 797, 806 (2 Cir.); *Taylor* v. *Washington Terminal Co.*, (D.C. Cir.) 409 F. 2d 145, 148.) Only where the trial judge has abused his discretion in finding "nothing untoward, inordinate, unreasonable or outrageous" about the verdict will the court of review interfere. (*Gruenthal* v. *Long Island RR. Co.*, 393 U.S. 156, 160.)

So also the likelihood of future pay increases or inflation is an established factor. (*Gruenthal* v. *Long Island RR. Co.*, 393 U.S. 156, 160.) This is recognized by all authorities on the law of damages.

THE OPINION OF THE ILLINOIS SUPREME COURT IN ALLOWING EVIDENCE OF A PENSION FIXED BY LAW UNDER THE RAILROAD RETIREMENT ACT IS NOT CONTRARY TO THE DECISION OF ANY COURT.

Petitioner urges that a series of cases including *Eichel* v. *New York Central R. Co.*, 275 U.S. 253 (1960), as well as others are contrary to the opinion of the Illinois Supreme Court. In each of those cases the benefits received under the Railroad Retirement Act were relied upon either to show plaintiff's failure to return to work due to malingering or to mitigate damages. As the Illinois Supreme Court opinion succinctly states:

> "The authorities offered by the defendant to support the appellate court's view did not involve the issue we consider. In *Eichel* v. *New York Central R.R. Co.*, 375 U.S. 253, 11 L. Ed. 2d 307, 84 S. Ct. 316, which was relied on by the appellate court, the Supreme Court held that the trial court properly excluded evidence that the plaintiff was receiving a disability payment of $190 per month. The decision does not have force here, however, for the evidence had been offered by the defendant to show that the plaintiff's failure to return to work was due to malingering. The other cases advanced by the defendant (*Sinovich* v. *Erie R.R. Co.* (3rd cir. 1956), 230 F. 2d 658; *Hetrick* v. *The Reading Company* (D.C. N.J. 1941), 39 F. Supp. 22; *Riley* v. *West Virginia Northern R. Co.* (1948), 132 W. Va. 208, 51 S.E. 2d 119; *Missouri Pacific R.R. Co.* v. *Wellingham* (Tex. Civ. App. 1961), 348 S.W. 2d 764; *Gilroy* v. *Erie-Lackawanna R.R. Co.* (S.D. N.Y. 1968), 279 F. Supp. 139; and *New York, New Haven & Hartford R. Co.* v. *Leary* (1st cir. 1953), 204 F. 2d 461) are to the effect that a defendant may not mitigate damages by introducing evi-

dence of the plaintiff's pension rights. They are not relevant here."

"Raines offered the evidence of his lost pension rights in proof of the injury inflicted on his future earning capacity." (p. 5a, Pn.)

That one must have ten years of service to qualify for the benefits of the Railroad Retirement Act does not affect the admissibility of such evidence but goes only to its weight. Under petitioner's contention a person would have to actually obtain the pension to have it regarded as part of his damages. Here, the pension rights provided by the Railroad Retirement Act are certain; they are determined by law. (A. 145, 146)

That the Railroad Retirement Act has pension provisions cannot be denied. (45 USC Sec. 228a *et seq.*) Nor would the admission of the loss of future pension benefits amount to a duplication of future lost wages. The Illinois Supreme Court specifically held this observation to be erroneous. (p. 7a, Pn.) It is patent that Raines could not be receiving a pension at the same time he was working for the railroad. If one worked until he became eligible for retirement in the railroad industry, took his retirement and thereafter pursued other work, he could recover whatever damages would be sustained as a result of (a) his inability to work; (b) to work until he received a pension, and (c) to then do whatever he thereafter desired. (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291 (1 Cir. 1966).)

Petitioner seeks to gloss over the *Boston & Maine Ry. Co.* decision (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291) with the gratuitous statement that "no one objected to their admissibility." (p. 9, Pn.)

In that death action under the Federal Employers' Liability Act, we find:

> "At the time of his death Talbert was earning $9237 per year and had a life expectancy of 24.6 years. At age sixty-five, he would have retired with a pension of $287 per month for the rest of his life and could have supplemented this amount by other employment." (p. 291)

The pension involved was the Railroad Retirement Pension. As if that were not enough, the question both in the trial court and on appeal as to whether the contributions of the defendant toward a railroad pension could be shown. That this issue was contested is apparent:

> "The evidence of Talbert's income taxes and railroad retirement contributions here was properly excluded . . ." (*Boston & Maine Ry. Co.* v. *Talbert*, 360 F. 2d 286, 291.)

Loss of pension rights is in the same category as loss of future earnings. They are recognized in both state and federal courts. (See *Cunningham* v. *Rederiet Vindeggen A/S*, (2 Cir. 1964) 333 F. 2d 308; *Healy* v. *Rennert* (1961), 9 N.Y. 2d 202, 213 N.Y.S. 44, 173 N.E. 2d 777; *Groat* v. *Walkup Drayage and Warehouse Co.*, (1936), 14 Cal. App. 2d 350, 58 P. 2d 200; *Gatenby* v. *Altoona Aviation Corp.*, 277 F. Supp. 1011 (1968); *Wands* v. *Cauble*, 154 S.E. 2d 425; *Nollenberger* v. *United Air Lines, Inc.*, 211 F. Supp. 734 (1963). The question of admissibility of pension income is frequently found in death cases. (See 81 A.L.R. 2d 950).

THERE IS NO CONFLICT BETWEEN STATE AND CIRCUIT COURTS OF APPEAL AS TO WHETHER A JURY SHOULD BE PERMITTED TO CONSIDER THE ELEMENT OF FEDERAL INCOME TAX IN AWARDING DAMAGES.

Petitioner sought to have the jury instructed that the award would not be subject to income tax. "As to the remaining issue of failing to instruct the jury that the award would not be subject to income tax, we say that such an instruction is not proper." (p. 27a, Pn.)

This is the narrow scope of the broad question of Federal income taxation. The Illinois Supreme Court in the F.E.L.A. case of *Hall* v. *Chicago and Northwestern R. Co.*, 5 Ill. 2d 135, 151, 152, 125 N.E. 2d 77 (1955), held that this was immaterial because: (a) what the plaintiff does with the award and how the defendant acquires it is of no concern to the jury; (b) this is a matter between the plaintiff and his government; and (c) if damages were to be mitigated by the income tax exemption then the Congressional intent to give the injured party a tax benefit will be nullified.

Again here is the problem of deductions. As *McWeeney* (*McWeeney* v. *New York, N.H. & H. RR. Co.*, (2 Cir.) 282 F. 2d 34) points out, are the procreative proclivities and potentialities of the individual and his spouse to be considered? Nor is the tortfeasor to be allowed this benefit. If Congress intended to allow the wrongdoer the income tax deduction, it must be presumed it would have said so, since this question first arose in 1944. (*Stokes* v. *United States*, (2 Cir.) 144 F. 2d 82.)

Petitioner's contention has been almost universally rejected. The Circuit courts have uniformly excluded this element in computing damages in actions under the Fed-

eral Employers' Liability Act. (*Boston and Maine RR. Co.* v. *Talbert*, 1 Cir., 360 F. 2d 286; *McWeeney* v. *New York, N.H. & H. RR. Co.*, 2 Cir., 282 F. 2d 34; *Payne* v. *Baltimore and Ohio RR. Co.*, 309 F. 2d 546; *Curl* v. *Chicago and Northwestern R. Co.*, 178 F. 2d 497.)

This element has not only been excluded in actions under the Death on the High Seas Act, (*Petition of Marina Mercante Nicaraguense, S.A.*, (2 Cir.) 364 F. 2d 118; *Noel* v. *United Aircraft Corporation*, 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 224 F. 2d 5; *Stokes* v. *United States*, 2 Cir., 144 F. 2d 82, 87.), but it has been held reversible error to consider income taxation. (*Petition of Marina Mercante Nicaraguense, S.A.*, 2 Cir., 364 F. 2d 118, 125; *Noel* v. *United Aircraft Corporation*, 359 F. 2d 671.)

Death on the High Seas Act provides the same remedy as the Federal Employers' Liability Act. (45 U.S.C.A. Sec. 51 *et seq.*; *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 343.)

State Supreme courts have almost uniformly refused to instruct on this element. (For an exhaustive collection see 63 A.L.R. 2d, pp. 1394 *et seq.*, as well as the Later Case Service.)

O'Connor v. *United States*, 269 F. 2d 578 (C.A. 2, 1959), cited by petitioner was a federal tort claim action determined by the law of Oklahoma and specifically rejected by the same court in *McWeeney* v. *New York N.H. & H. RR.*, 282 F. 2d 34, 39.

Cox v. *Northwest Airlines, Inc.*, 379 F. 2d 893, did not involve a jury instruction. It referred to the repudidated *O'Connor* decision (*O'Connor* v. *United States*, 269 F. 2d

578 (C.A. 2, 1959). Moreover, each of these cases has not been followed in the respective circuits.

Domeracki v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251, announced a rule to have perspective operation. There was requested an instruction different from the one here on the question of federal income taxation (pp. 1248, 1249). It was refused and the judgment was affirmed. A single opinion announcing a perspective operation is not ground for this Court's review.

THERE IS NO DIVISION OF AUTHORITY AS TO WHETHER INFLATION MAY BE CONSIDERED IN DETERMINING THE AMOUNT OF DAMAGES TO BE AWARDED IN F.E.L.A. CASES.

Inflation in itself is not an element of damages. Rather it is a part of the future damages which will be sustained from inability to work. Nor is there any division of authority. The cases cited by petitioner are not relevant. They announce the principle that future damages must be reduced to present value. (*Petition of United States Steel Corp.*, 436 F. 2d 1256; *Williams* v. *United States*, 435 F. 2d 804, 807 (C.A. 1, 1970); *Sleeman* v. *Chesapeake & Ohio Ry. Co.*, 414 F. 2d 305, 308 (C.A. 6, 1969).)

That *Sleeman* was reversed solely on this ground is obvious from a subsequent opinion of the same Circuit.

> "Additionally, we observe that the discussion in *Sleeman* of the consideration of current economic trends in awarding future damages was dictum inasmuch as reversal resulted from the failure of the District Court to reduce future damages to their present worth." (*Willmore* v. *Hertz Corporation*, (6 C.A.) 437 F. 2d 357 (1971).)

We have seen that future damages were reduced to present value here. (pp. 15a, 5a, Pn.)

Murphy v. *Eaton, Yale & Towne, Inc.*, 444 F. 2d 317, 328 (C.A. 6, 1971), involved a multitude of errors, the least of which was an instruction which erroneously undertook to define the element of damages. Petitioner cited no case which supports its petition that economic changes are not relevant, but see 22 Am. Jur. 2d, par. 87, page 125, entitled "Change in cost of living or in purchasing power of money."

Here the evidence complained of was an economist's testimony that based upon the past history of increases for railroad workers, it was his opinion that increases would continue and that prices would rise. (p. 7a, Pn.) He did not undertake to state the particular increases (A. 145) but this was left to the jury.

The other authorities portrayed as representing "the opposite view" (p. 13, Pn.) do not touch upon the question of failure to reduce to present value future loss of earnings but on the contrary state that, inflation is a matter to be considered.

Inflation is nothing more than higher prices and higher wages. That changes in the purchasing power of money are a proper subject matter for the argument of counsel is well established. (12 A.L.R. 2d 638; *Waiswila* v. *Illinois Cent. R. Co.*, 220 Ill. App. 113, an action under the Federal Employers' Liability Act.)

So also instructions on economic changes have had judicial approbation.

In *Cunningham* v. *Bay Drilling Company,* (5 Cir.) 421 F. 2d 1398, an action under the Jones Act, which incorporates the Federal Employers' Liability Act, the instruction complained of, footnoted on page 1399, was:

> "It is now well recognized that the decreased purchasing power of the dollar, due to rise in living expenses, is a proper element for consideration in determining the amount of award in a tort action. Courts take judicial notice of that fact."

(See also *New Amsterdam Casualty Co.* v. *Soileau,* 5 Cir., 167 F. 2d 767; *Burlington Transp. Co.* v. *Stoltz,* 10 Cir., 191 F. 2d 915; *Chadel* v. *Spira,* 303 P. 2d 879; *Normand* v. *Thomas Theatre Corp.,* 349 Mich. 50, 84 N.W. 2d 451; *Garrett* v. *Taylor,* 69 Idaho 487, 210 P. 2d 836; *Moore* v. *Public Service Coordinated Transport,* 15 N.J. Super, 499, 83 A. 2d 725; *Willmore* v. *Hertz Corporation,* (6 C.A.) 437 F. 2d 357 (1971); *Bearden* v. *LeMaster,* 226 So. 2d 647), as well as on special interrogatories on this subject. (*Nollenberger* v. *United Air Lines, Inc.,* 216 F. Supp. 734.)

Likewise this matter is the subject of expert testimony. (*Har-Pen Truck Lines, Inc.* v. *Mills,* 5 Cir., 1967, 378 F. 2d 705; *Krohmer* v. *Dahl,* (Mont. 1965), 402 P. 2d 970; *Port O'Call* v. *Borris,* 206 So. 2d 241, (Fla. App. 1968); *Complete Auto Transit, Inc.* v. *Reese,* 425 P. 2d 465 (Okla. 1967); *Diener* v. *White Consolidated Industries, Inc.* (Ohio App.) 239 N.E. 421; *Schmitt* v. *Jenkins Truck Lines, Inc.,* 170 N.W. 2d 632; *Schuler* v. *Berger,* (E.D. Pa.) 275 F. Supp. 120, 121 (1967).)

Although here the evidence complained of was that wages of railroad workers would continue to rise, as well

as prices, there was no instruction on the subject. Certainly if this is a matter of which courts take judicial notice, which counsel may argue to the jury and the subject of jury instructions, how can it be said to be improper to introduce evidence upon it? Petitioner has no authority of such impropriety.

CONCLUSION.

Petitioner submitted this cause to the jury solely on the issue of damages. The jury returned a verdict not to its liking. Notwithstanding that the verdict had the approval of the trial court and that neither the intermediate appellate court nor the Illinois Supreme Court, which followed the mandate of this court in *Grunenthal v. Long Island Ry. Co.*, 393 U.S. 156, found the amount awarded to be excessive, it seeks here to carve out new patterns in the law of damages.

The Petition for Writ of Certiorari ought to be denied.

Respectfully submitted,

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No. 72-315

In the

Supreme Court of the United States

OCTOBER TERM, 1972

NEW YORK CENTRAL RAILROAD,

Petitioner,

vs.

JO ANN RAINES, as Special Administrator of the Estate of Thomas Raines,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE RESPONDENTS' STATEMENTS THAT THE RAILROAD WAIVED THE RIGHT TO COMPLAIN ABOUT THE EVIDENCE OF NEVER ENDING INFLATION IS NOT TRUE.

A. The Railroad Did Object And Was Given A Continuing Objection To Testimony Of Continuing Inflation.

In the first paragraph on page 4 of the Brief in Opposition to Petition for Writ of Certiorari, respondent charges that the testimony of the economist offered by it was not objected to by petitioner. This assertion is untrue. At pages 360-361 of the Record the objection to the improper evidence is demonstrated, together with the deep reservations of the trial court judge in permitting the admission of such evidence at all:

360 Mr. Dooley: The only thing that I am going to ask him is this question: Whether in his opinion, this particular inflationary spiral that we are in will continue. I'm not going to ask him how long or anything else.

Mr. Domash: Then, what relevancy does it have on the case? You have to know how long because the jury is going to be asked—

The Court: You can cross examine. You can get McChesney and get depression is coming and so forth.

Mr. Domash: The Jury is going to be asked to evaluate this man's lost earnings over his life expectancy, isn't that right, forty-two point eight years?

Mr. Dooley: Yes.

Mr. Domash: So, you are just saying what's going to happen in the future. Well, you have got to be more definite than that. You just can't say not for how long. Your witness—

The Court: Nobody can really tell.

Mr. Domash: And, that's why this is highly speculative.

361 Sure, for a year or two, you might be able to have some—

The Court: You say this has been allowed? You assure me of this?

Mr. Dooley: Yes.

The Court: On your assurance, Jim, I'm going to take it. You are asking an economist. I couldn't project.

Mr. Dooley: I'm just given you the actual testimony. I'm not going to get into this—

The Court: I'm not going to send these into the Jury room with them because you will have them in there for six years and they will go all cockeyed.

Mr. Domash: Judge, in order that we might not interrupt and so that we will proceed in an orderly fashion, May we have a continuing objection to all of these questions and also to the exhibits? What are their numbers, Jim?

Mr. Dooley: 92, 93, 94, 95 and 96.

The Court: When he offers them I'll say "over objection."

B. The Post-Trial Motion Did Object To The Speculative Testimony Of The Economist.

Respondent then charges in the last sentence of the same paragraph on page 4 that petitioner failed to complain of the objected testimony in its post-trial motion. This charge too is false. The objection was made as follows at page 147 of the Record:

> "11. The Court erred in admitting, over the objection of the defendant, the testimony of economist Dr. Henderson, on the grounds that said testimony was immaterial, irrelevant, highly prejudicial to the defendant, and pure speculation and conjecture, not being based on admitted or admissible facts."

It was also objected to in paragraphs 12 and 13 of the post-trial motion (R. 147-148).

C. The Railroad Did Not Introduce Any Speculative Testimony Of Inflation And Did Not Waive Its Objection To Its Admissibility.

At the bottom of page 4 of the Brief in Opposition to Petition for Writ of Certiorari, respondent charges that petitioner also introduced evidence of which it now com-

plains. The difficulty with this argument is twofold. First, it is false—petitioner introduced no evidence based upon speculation or conjecture. The evidence offered merely showed the then cost of purchasing an annuity. Second, the statement concedes that the evidence introduced by respondent was in fact improper and prejudicial as petitioner contends.

Predicting the future is necessarily speculative and conjectural and therefore inconsistent with the process of litigation which demands that verdicts be based on conclusions drawn from facts testified to in open court. As stated in *Sleeman* v. *Chesapeake & Ohio Ry.*, 414 F2d 305 (CA6, 1969) at 308:

> "Of course, the nation's economic history since the 1930's would appear to make the use of present wages as the standard for loss of future earnings somewhat unfair to plaintiffs. But as to the future, the inflation versus deflation debate rages inconclusively at the highest policy levels of our government, in national electoral campaigns, in learned economic journals and is exemplified in the daily gyrations of the stock markets. The debate seems unlikely to be resolved satisfactorily in one personal injury trial."

The speculative, conjectural and totally improper nature of the objected testimony is demonstrated dramatically in the single statement of the plaintiff's economist, John P. Henderson, at page 448 of the Record:

> "If I were a betting man, I would bet that there will be a formal deflation of the dollar after the 1968 election."

The same waiver arguments now advanced by respondent were made and rejected by the Illinois Appellate

Court and the Illinois Supreme Court. Both courts ruled on the merits because there was no waiver.

CONCLUSION

Contrary to respondents' statements, the cases are in conflict on:

1. the admissibility into evidence of Railroad Retirement Benefits;

2. instructing the jury that its award is not subject to income tax; and

3. allowing the jury to hear evidence of inflation.

This Court should grant the writ.

Respectfully submitted,

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Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Petitioner has filed a Reply Brief which is almost wholly devoted to charging Respondent with making untrue representations. In order that the Court might be apprised of the want of substance to such grave charges, Respondent is filing this Supplemental Brief.

Petitioner has represented that it was given a continuing objection to testimony of continuing inflation and that it did not introduce any evidence. (Reply Brief p. 1, 3)

THE PETITIONER WAS NOT GIVEN A CONTINUING OBJECTION TO TESTIMONY CONCERNING INFLATION

Petitioner states: "The Railroad did object and was given a continuing objection to testimony of continuing inflation." (Reply Brief, p. 1)

Our comment on the want of objection was prompted by Exhibit C (pp. 28a-30a) of Petitioner's Brief in which certain excerpts of multiple witnesses were referred to. The testimony excerpted from the witnesses, McKinley, Mullen and Tripple, was admittedly without objection.

Concerning Dr. Henderson the Reply Brief shows (p. 3) that the only matter about which there could be a claim of continuing objection involved Exhibits 92, 93, 94, 95 and 96. But none of these involved future wages or future prices. Actually there are but four, 93, 94, 95, 96. (A. 123) These were studies of what had occurred in the past.

Plaintiff's Exhibit 93 is a chart prepared from statistics of the United States Department of Labor (A. 123), including the consumer price index from 1914 to 1967.

Plaintiff's Exhibit 94 is a chart of the United States Department of Labor statistics (A. 125, 126), showing the earning of railroad workers from 1946 to 1966.

Plaintiff's Exhibit 95 is an official publication of a chart of the United States Department of Labor.

Plaintiff's Exhibit 96 is a table showing the hourly earnings of railroad workers from 1946 to 1966. (A. 126, 127, 129)

Nowhere does the record show the court either ordered or granted a continuing objection concerning testimony concerning future prices and wages, or Respondent so stipulating.

THE POST TRIAL MOTION

It is true that Paragraph 11 of the post trial motion alleges Dr. Henderson's testimony to be "immaterial, irrelevant and highly prejudicial to the defendant and pure speculation and conjecture." (A. 11-20) The testimony referred to is not spelled out as required by the Illinois Rules of Practice. This is particularly true when much of Dr. Henderson's testimony had to do with other matters Petitioner at no time complained of throughout this long appellate process.

Nor do Paragraphs 12 and 13 of the post trial motion cover this subject matters as Petitioner asserts. (p. 3, Reply Brief)

Paragraph 12 of that motion involves this witness' testimony pertaining to his estimates and speculation as to what would happen to interest rates and wages of railroad employees over the life expectancy of plaintiff . . ." But Dr. Henderson never gave any testimony whatsoever concerning future wages of railroad employees, let alone wages over the life expectancy of the plaintiff. Nor did he testify concerning future interest rates. Petitioner has never so contended.

Paragraph 13 of the post trial motion (A. 12) concerns Exhibits 93 to 96, inclusive, of which there has been no complaint throughout the entire appellate process.

THE RAILROAD INTRODUCED EVIDENCE OF SIMILAR CHARACTER

As both the Appellate Court (p. 21a Pn.) and the trial court (R. 721) noted, each party introduced interest rates and fluctuations in the market. Petitioner represents to the Court that it did not introduce any speculative testimony of inflation but states "the evidence offered merely showed the then cost of purchasing an annuity." (p. 4, Reply Brief) Here is what the record shows:

Mr. Thomas C. Smith, a self-anointed "estate engineer" (A. 181) stated under examination by counsel for Petitioner:

> "If I accepted that there would be an annual rise in salary or earning at 5%, then my salary would double in 13 years about. If I were making $5,000 a year it would be $10,000 in about 14 years to be exact, the money would double at 5% in 14 years."

The purpose of the cost of annuity was to avoid fluctuations in the market. (A. 188) This was directed to the issue of inflation.

As if that were not enough defendant introduced the following improper evidence concerning the return on investments of tax exempt institutions and improperly got before the jury the contents of an article from the Journal of Business.

> (Defendant's) "Exhibit 3 is an Article from the Journal of Business relating to this study. Page 9 of this exhibit, shows a study over a 35 year period. 1926 to 1960. It shows a rate of return of 9% for tax exempt institutions. By tax exempt institutions, I mean institutions that aren't subject to tax, that includes uni-

versities and so on. Institutions that invest their money in the stock market and are not subject to tax, such as universities get 9%. This exhibit shows that for tax exempt institutions, it was 9%. For persons in a $10,000 income class it would be 8.2% and it was 6.8% for persons in the $50,000 income class."

What *tax*-free foundations earned on their investments could possibly be no criterion of what an individual could obtain on his investment.

Equally incorrect is the statement: "The same waiver arguments now advanced by respondent were made and rejected by the Illinois Appellate and the Illinois Supreme Courts." (Reply Brief, p. 4) The opinions of those courts in Petition for Certiorari make manifest this inaccuracy.

We again submit this opinion of the Supreme Court of Illinois is in accord with the practice and procedures well established in that State, and in accord with applicable decisions of this Court. This is not an opinion of a court of appeals in conflict with the decision of another court of appeals on the same matter.

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